

i [Orders accordingly. Costs to the plaintiff].

Legislation referred to:

Legal Profession Act 1976, ss. 94, 95(1)(3), 96, 96(3), 97, 98(a)(b)(c), 99, 99(3), 101(3)

(Ed. Note: This judgment although dated 20 March 1992 was sent to us together with the decision of the Supreme Court which is reported at page 417 and is carried for completeness.)

For the plaintiff - S. Vendargon; M/s. Vendargon & Partners

For the defendants - N. Navaratnam; M/s. Shearn Delamore & Co.

JUDGMENT

Hj. Mohd Eusoff b. Chin J:

Under s. 95(1) of the Legal Profession Act 1976 (hereinafter referred to as the Act), a complaint against an advocate and solicitor, pupil or articled clerk "shall in the first place be made to the Bar Council". The Bar Council under s. 95(3) of the Act "shall refer every complaint" to the relevant State Bar Committee which must in turn investigate and inquire into the complaint. Section 96 of the Act provides the steps to be taken by the State Bar Committee in its investigation of the complaint, and the State Bar Committee is required to submit its report and recommendation to the Bar Council within 3 months from the date the complaint was referred to that State Bar Committee by the Bar Council. However, where the State Bar Committee fails to submit its report within the 3 months' period, the Bar Council must refer the complaint to the Inquiry Committee appointed by the Bar Council under s. 94 of the Act. The Inquiry Committee is required to investigate the complaint, and must, within 3 (three) months after the date of the reference to it by the Bar Council, submit its report and recommendation to the Bar Council.

The State Bar Committee or the Inquiry Committee is required by law to state whether or not it recommends that the complaint be referred for normal inquiry by a Disciplinary Committee to be appointed by the Chief Justice.

Section 98 of the Act states -

98. Decision of Bar Council on reports.

The Bar Council **shall, within six weeks** of being furnished with the report mentioned in s. 96 or s. 97 -

- (a) determine whether a formal inquiry into the complaint by a Disciplinary Committee is necessary;

- a (b) if it determines a formal inquiry to be necessary, forthwith apply to the Chief Justice to appoint a Disciplinary Committee to conduct the formal inquiry, and
(c) notify in writing the advocate and solicitor and the person by whom the complaint was made or the information referred, of the findings of the Inquiry Committee or of the Bar Committee, as the case may be, and of the determination of the Bar Council made under paragraph (a).
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I note that the period of six weeks applies to action to be taken by the Bar Council under sub-paragraphs (a), (b) and (c) of this s. 98.

- c Under s. 99 of the Act, the Chief Justice has to appoint a Disciplinary Committee within 14 days after receiving an application from the Bar Council. A Disciplinary Committee consists of 3 advocates and solicitors of 7 years' standing, and having valid practicing certificates. The Chief Justice has the discretion under s. 99(3) of the Act to revoke the appointment, or remove any member of a Disciplinary Committee, or fill any vacancy in a Disciplinary Committee.
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- e Although a Disciplinary Committee has to complete its inquiry into a complaint against the conduct of an advocate and solicitor in his professional capacity, and to file the order it has made in respect of the inquiry, with the Bar Council and the Registrar of the High Court within 3 months from the date the Disciplinary Committee was appointed, the Chief Justice is empowered to extend the period of 3 months under s. 101(3) of the Act, upon an application made to him by the Disciplinary Committee.
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- g The events that took place in this case and not challenged by the respondents, are found in the affidavit of the plaintiff affirmed on 27 February 1989, and are as follows:

The complainant is the Bar Council Malaysia itself.

- h On 6 June 1988 the Bar Council made a complaint against the plaintiff and his partner Malek, with respect to mismanagement of the Trust Account of M/s. Malek & Joseph Au.

On 3 July 1988, the Bar Council referred its complaint to the State Bar Committee, Pahang.

- i On 3 September 1988, the State Bar Committee Pahang forwarded its report and recommendation to the Bar Council.

On 26 October 1988 (54 days later) the Bar Council applied to the Chief Justice to appoint a Disciplinary Committee to investigate the complaint.

Under s. 98 of the Act the Bar Council is given 6 (six) weeks to determine if a formal inquiry into the complaint by a Disciplinary Committee was necessary, and if so, the Bar Council is required **forthwith** to apply to the Chief Justice for the appointment of a Disciplinary Committee. It will be seen here that the Bar Council had taken more than 6 weeks to take action under s. 98 of the Act.

The question put to the Court is whether the time frames enacted by ss. 98 and 99 of the Act are mandatory or directory.

The Bar Council through the chairman of its Complaints Committee Dato' Dr. Peter Mooney, had put in an affidavit affirmed on 23 October 1990 in which Dato' Dr. Peter Mooney had given in detail how a complaint is dealt with and that because of numerous complaints received, it has become impossible for the time frames fixed by the various sections of the Act to be complied with. There are so many things that need to be done when dealing with a complaint. A State Bar Committee and the Inquiry Committee of the Bar Council each meet once a month and because of that a complaint received from the Bar Council may take a month before it is seen by a State Bar Committee or the Inquiry Committee. Dato' Dr. Peter Mooney said that the Bar Council has always viewed the time frames fixed by the law as directory.

Part VII of the Act deals with disciplinary proceedings against an advocate and solicitor. A disciplinary proceeding may result in an advocate and solicitor being removed from the Roll, or suspended from practice or fined a maximum of RM5,000. It is, therefore, a serious matter.

It is necessary to examine ss. 96(3) and 97 of the Act which state -

96. (3) In the event that the State Bar Committee fails to submit its report of its investigation or inquiry **within three months** of the date when the complaint or information was referred to it, the Bar Council shall refer the information or complaint to the Inquiry Committee.

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97. (1) The Inquiry Committee shall forthwith investigate or inquire into any complaint or information referred to it by the Bar Council and shall, within three months of the date of such reference, furnish to the Bar Council its report which shall contain its recommendation as to whether or not the complaint or information be referred to a Disciplinary Committee for a formal inquiry.

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Section 98 has been quoted earlier. I think, without having to labour on the meaning of "shall" and "may", the intention of the Act is quite clear in that when it comes to disciplining an advocate and solicitor, the required actions to be taken must be done within the time frames provided for by the Act. Otherwise serious inconvenience and injustice may be suffered by both the complainant and the advocate and solicitor facing the complaint. Further, Encik Navaratnam for the Bar Council admitted to the Court that the Bar Council was consulted before this Act was taken to Parliament. Therefore, it cannot be said that the time frames fixed by the Act for completion of the various stages of the disciplinary actions have been fixed arbitrarily by the legislature. The purpose of fixing the time frames, no doubt, is to ensure speedy disposal of complaints against advocates and solicitors. Where, therefore, the situation is such that it has become impossible to comply with the time frames, the matter should be brought to the attention of the Government to have the time frames amended. But as long as they remain in the statute book, the clear intention is that the time frames are mandatory, and failure to comply with them will render the exercise of disciplinary action invalid, null and void. I also find that the time frame of 6 weeks fixed by s. 98 of the Act for the Bar Council to peruse the report and recommendation received from the State Bar Committee and to decide whether or not to apply to the Chief Justice under that section is not absurd but reasonable. The delay in taking action is due to the fact that the Bar Council's Inquiry Committee and the State Bar Committee sit once a month and this situation can be easily rectified if their sittings are held more often than once a month.

As regards s. 99 of the Act, subsections (1) and (3) state -

99.(1) The Chief Justice shall within fourteen days of an application made by the Bar Council in that behalf appoint a committee to be

known for the purpose of this Act as a "Disciplinary Committee", from among advocates and solicitors of not less than seven years' standing and having valid practising certificates.

Provided that no advocate and solicitor who is a member of the Inquiry Committee or has been involved in the inquiry or investigation of the complaint which has led to the making of the aforesaid application shall be appointed.

- (3) The Chief Justice may at any time revoke the appointment of or remove any member of a Disciplinary Committee or fill any vacancy in a Disciplinary Committee.

Again in this case I am of the view that the wordings of s. 99(1) would give the meaning that the period of 14 days must be intended to be mandatory. However, in view of subsection (3) of s. 99 of the Act, the fact that the Chief Justice in this case took more than 5 months to appoint the present Disciplinary Committee does not mean that he had not appointed the Disciplinary Committee within the 14 days. There might have been revocations and substitutions of members of the Disciplinary Committee before the present Disciplinary Committee was finally approved and appointed.

I find that under s. 98 of the Act, the Bar Council must make its determination within 6 weeks of the receipt of the report mentioned in ss. 96 and 97, and if it determines a formal inquiry is necessary, it must forthwith apply to the Chief Justice to appoint a Disciplinary Committee to conduct a formal inquiry. I also find that in this case, the Bar Council applied to the Chief Justice to appoint the Disciplinary Committee after the period of 6 weeks. Since the mandatory period of 6 weeks prescribed by s. 98 has not been complied with by the Bar Council, its application to the Chief Justice under s. 98(b), and the subsequent appointment of a Disciplinary Committee by the Chief Justice, are rendered invalid, null and void.

I therefore made the orders declaring:

- 1) that the time frames provided for in ss. 98 and 99 of the Legal Profession Act 1976, are mandatory
- 2) that on the facts, the appointment of the Disciplinary Committee is invalid, null and void,
- 3) Costs to plaintiff by respondent No. 1.

a KANG MOI LAN @ KANG HOI LAN

v.

KANG AH LANG @ KONG AH MOY

**b HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 22-39-1989]
19 JANUARY 1993**

c LAND LAW: Property in name of defendant - Given to her by her father - Plaintiff claiming that her parents had promised her the property - Whether promise legally binding on defendant - Whether capable of defeating defendant's indefeasible title.

d TRUST: Plaintiff claiming defendant holding property on trust - Defendant executing deed of trust in favour of plaintiff - Whether deed of trust voluntarily executed - Whether signed under duress - Whether deed valid.

e The defendant is the registered proprietor of land in Grisek (the Land) which was transferred to her by her late father in 1969. The plaintiff, the defendant's sister, claimed that the Land was transferred to the defendant as trustee for the plaintiff and sought an order that the Land be transferred to her absolutely.

f The plaintiff also put into evidence a deed of trust (the Deed) signed by the defendant in 1988 in favour of the plaintiff. The defendant claimed that the Deed was signed under duress and counterclaimed for a declaration that the Deed be set aside and for the removal of the caveat lodged by the plaintiff against the title to the Land.

Held:

g [1] There was no evidence that at the time the father transferred the Land to the defendant it was being so transferred on trust for the plaintiff. The Land was transferred unconditionally and absolutely at the behest of the father to the defendant.

h [2] There was no evidence of agreement between the defendant on the one part and her father or her mother or both of them on the other part, binding in law, whereby the defendant was required by parental direction to transfer and part with the Land and title thereto.

i [3] The Deed was signed late at night in surroundings oppressive to the defendant and not conducive to the defendant's will being